In the Supreme Court of the United States.

October Term, 1904.

No. 208.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, *Plaintiff in Error.*

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

In error to the Supreme Court of the State of Pennsylvania.

BRIEF OF ARGUMENT IN BEHALF OF THE COMMONWEALTH OF PENNSYLVANIA, DEFENDANT IN ERROR.

This case involves an examination of the tax laws of Pennsylvania and the decisions of her courts in interpreting and expounding them. A strong effort is made

by the plaintiff in error to induce this Court to reverse a well-considered judgment of the court of last resort in the State, embodying after two arguments the unanimous opinion of six justices (one judge being absent), affirming a former, recent, unanimous opinion of seven justices, constituting the entire Court, based on a long line of State decisions, the stability of which ought not to be disturbed except for grave and manifest error from a federal point of view.

I

The tax claimed is not a tax directly laid upon tangible property situate outside of the State, but is a capital stock tax imposed directly upon the capital stock of a Pennsylvania corporation at a fixed rate of five mills upon each dollar of the actual value of the whole capital stock, including bonds, mortgages, moneys at interest, owned by the company, franchises and property of other kinds.

There is an ingenuity of obscurity in the statement of the case and in the argument by which it is supported.

Thus, at the very outset of the paper book of our opponents, the loose, and therefore misleading, statement is made that the Pennsylvania revenue statute "taxes the property of domestic corporations— 'having capital or property employed or used in this Commonwealth,' " and the very first proposition advanced in the argument is that "The tax claimed is a tax on property." Unless caution is used, the inference might be drawn that the tax claimed was a specific tax laid upon a specific article of property as such; whereas the tax claimed is a tax upon capital stock *"at a fixed rate of five mills upon each dollar of the actual value of their whole capital stock,, including as well their bonds, mortgages and moneys at interest as their franchises and property of other kinds:"*—that is, the tax is upon capital stock at a fixed rate of its actual value, into the

computation of which certain items enter, which are fairly to be spoken of as the property of the corporation. It is in this sense only that a tax on the capital stock of a corporation is a tax on property, but it is a tax on its property *only in the sense that it is a tax on capital stock representing franchises and* assets including its properties. *Com.* v *N. Y. P. & O. Railroad, 188 Pa. St., 185.* As was said by Mr. Justice Brown in *Com.* v. *Penn. Coal Co., 197 Pa., 553:* "Capital stock tax is a property tax, but the property of the corporation, for the purpose of taxation, is reached *through* the tax imposed directly upon the stock, the value of which is ascertained, in the first instance, as directed by Act of Assembly."

There is no specific tax laid on any item of property. This appears from so much of the preamble of the Revenue Act as is quoted in the third paragraph of page 10 of the paper book of the plaintiff in error. It also appears, from the 4th section of the act, as set forth on pages 10, 11 and 12 of the same paper book, that the whole object of the report required by the statute is to enable the State officers to truly estimate and appraise *"the capital stock of the company at its actual value in cash."*

This is equally clear from Section 5 of the act as set forth on pages 13 and 14 of the same paper book. Instead, then, of its being a tax directly laid on the property of corporations having capital stock, it is more proper to say that it is a tax on the capital stock of corporations having property; and that as such, and in this sense only, is it a tax on corporate property and assets including its franchises. This is made still

further manifest from the fact that the first section of the Revenue Act of 8th of June, 1891, (*Laws of Pennsylvania, pp. 229 and 230 et. seq.*) specifically deals with taxation of personal property for State purposes, and the rate is fixed at four mills. In Pennsylvania the capital stock tax is popularly spoken of as "The Five Mills Tax" and the personal property tax is spoken of as "The Four Mills Tax." The two are distinct and should not be confused. It is the latter only which is in any sense of the term, popular or professional, *in rem*. The personal property tax is not involved in the present case. It is the former tax, the capital stock tax, "The Five Mills Tax" which alone is involved.

It is not meant by this argument to contend that a tax on the capital stock of a corporation is not a tax on its property in a certain sense, but the proper use of the phrase is established by the case of *Commonwealth* v. *N. Y. P. & O. Railroad, 188 P. S., 169,* in which the conclusion of law reached by Judge Simonton, a most learned expert in taxation matters, is stated on page 185 of the report:

"A tax on the capital stock of a corporation is a tax on its property and assets, including its franchises. The question of the actual value in cash of the capital stock is a question of fact which must be determined by considering the value of defendant's tangible property and assets of every kind, including its bonds, mortgages and money at interest, and its franchises and privileges; and the amount of the incumbrances on its property and franchises is also a relevant fact to be considered, but it is not to be specifically deducted from the valuation so ascertained and determined."

This was confirmed by the Supreme Court in an opinion by Mr. Justice Dean, speaking as follows:

"The statute having thus, in express terms, declared the subject of taxation to be *all* the property of corporations having capital stock, and the settled interpretation by this Court of a tax on the capital stock of a corporation being, that it is a tax upon *all* the property of the corporation, it is clear that the learned Judge of the Court below committed no error in the first sentence of his conclusion of law, thus: 'A tax on the capital stock of a corporation is a tax on its property and assets, including its franchises.'"

And the foregoing is to be read in connection with the most recent expression of the same Court: "Capital stock tax is a property tax, *but the property of the corporation,* for the purpose of taxation, *is reached through the tax imposed directly upon the stock.*" *Com.* v. *Penn. Coal Co., 197 Pa. St., 553.* Hence to guard against error and inexactness, it is proper to preface this argument by stating that:

A. There is a distinction between a tax on capital stock and a direct tax on personal property;

B. The tax complained of in this case is not a tax upon tangible property, but is a tax upon the actual value in cash of the capital stock of a corporation, into the value of which many items have entered besides the coal mined by, transported by and in the possession of the plaintiff in error for sale at the time of fixing the valuation of the capital stock by the State appraisers. In other words, the actual value in cash of the capital stock of a corporation is a question of fact and not of law, which must be determined by considering the

value of its property and assets of every kind, including its bonds, mortgages, and moneys at interest, and its franchises and privileges. Hence, to regard the tax in question as a tax upon coal, treated as tangible property and a tangible asset, specifically subject to tax, constitutes a conspicuous error in the argument of the plaintiff in error.

To emphasize the distinction between a tax on capital stock and a tax on personal property it is proper to set forth: *A;* a brief analysis of the taxing system of the State of Pennsylvania, and, *B;* a concise statement of the results attained under our decisions.

The caution to be observed is to guard against the misapprehension of considering the capital stock tax as a specific tax laid directly upon specific articles, entering into, representing and, in their aggregate, measuring the value of capital stock, which is *eo nomine,* made the subject of the tax.

A. Analysis of State Taxes in Pennsylvania

Classification of State Taxes.

The sources of revenue of the Commonwealth of Pennsylvania may be divided into two classes according to the method by which the revenues are collected, viz:

1. Taxes paid directly, or through other State officers, to the State Treasurer;

2. Taxes collected by county officers and by them paid to the State Treasurer.

Class I.

Taxes Paid Directly to the State Treasurer.

These are as follows:

1. Bonus on Charters. (Not involved in this case.)

2. *Tax on capital stock of corporations, or interests in limited partnership and joint stock associations.* Five mills tax. The tax in question.

3. Tax on corporate, county and municipal loans. (Not involved.)

4. Tax on the gross receipts of transportation, transmission and electric light companies. (Not involved.)

5. Tax on the stock of banks. (Not involved.)

6. Tax on the gross premiums of domestic insurance companies having capital stock, and on the premiums of foreign insurance companies. (Not involved.)

7. Tax on the net earnings, or income, of brokers, private bankers and unincorporated banks and savings institutions. (Not involved.)

8. Tax on the matured stock of building and loan associations. (Not involved.)

9. Excise tax on receipts of express companies. (Not involved.)

10. Escheats. (Not involved.)

11. Miscellaneous. (Not involved.)

(*Eastman on "Taxation for State Purposes in Pennsylvania," page 30.*)

Class II.

Taxes and Licenses Collected by County Officers and by Them Paid to the State Treasurer.

These are as follows:

1. Tax on personal property. (Not involved.)
2. Tax on collateral inheritances. (Not involved.)
3. Direct inheritance tax. (Not involved.)
4. Licenses. (Not involved.)
5. Tax on fees of office. (Not involved.)
6. Tax on writs, wills, deeds, etc. (Not involved.)

(*Eastman on "Taxation for State purposes in Pennsylvania," p. 146.*)

Class III.

Local taxation. (Not involved.)

This last class embraces taxation for *county* purposes, as taxes on real estate, houses, lands, lots or ground, ground rents, etc., personal estate, such as horses, mares, geldings, cattle; taxation in boroughs, taxation in townships, school taxes, road taxes, poor taxes. (*Eastman on "Taxation for State Purposes in Pennsylvania," page 235.*)

The argument in this case is concerned with item 2, italicized under Class I, and is not to be confused with item 1 under Class II., nor with any item of Class III.

B. Statement of Results Attained Under the Decisions.

The most important results attained by the decisions of the Supreme Court of Pennsylvania embrace the following principles:

The legislature has a general power of taxation which is necessary for the existence and preservation of the government.

It is one of the legislative powers conferred by the Constitution of Pennsylvania upon the General Assembly, and it may be exercised to any extent to which the State may choose to carry it, not in violation of the powers granted to the Federal government or the restrictions set forth in the State Constitution. (*Sharpless* v. *Mayor of Phila., 21 Penna. S. R., 160.*)

The legislature may tax the same subject once, twice or oftener. Such power is not prohibited by the Constitution; but, on the contrary, is conferred on that body by the general grant of power in the Constitution, the only feature required being that the intention must be clear.

(*Commonwealth* v. *Fall Brook Coal Co., 156 Penna. S. R., 488; Commonwealth* v. *Lehigh Coal & Navigation Co., 162 P. S., 603.*)

This power of taxation is so important that the State cannot surrender it. The third section of Article IX, of the State Constitution declares that, "The power to tax corporations and corporate property shall not be

surrendered or suspended by any contract or grant to which the State shall be a party."

We concede that, the power to regulate commerce between the States, being conferred on the Federal Government, such power cannot be interfered with nor such commerce regulated by State taxation imposed upon articles of commerce; and therefore a tonnage tax and a tax on gross receipts derived from interstate commerce, imposed by the State, were declared by the Supreme Court of the United States to be null and void.

(*Case of State Freight Tax, 15 Wallace, 232.*)

This however, was a case where the tax was expressly laid upon the freight carried.

So also we concede that property created under Acts of Congress and instruments or property used by the United States are not taxable by the State.

(*Retfuss* v. *Moore, 134 Penna. S. R., 462; Commonwealth* v. *Philadelphia Co., 157 P. S., 527.*)

We also concede that a legislature cannot go beyond the limits of the State for subjects of taxation. There must be jurisdiction over the property or person of the owner, otherwise the power cannot be exercised.

(*McCulloch* v. *Maryland, 4 Wheaton, 429; State Tax on Foreign Bonds, 15 Wallace, 300; Commonwealth* v. *Standard Oil Co., 101 Penna. S. R., 119.*)

It follows of course that persons or corporations must have a domicile in the State in order to be taxed,

and that if a thing be taxed the thing taxed must have a situs either actual or legal therein. Generally the situs of tangible personal property is where it is permanently located, and such property is taxable there, although the owner may reside in another jurisdiction; and as to intangible personal property its situs is at the domicile of the owner and the property is taxable there. The domicile of a corporation is the State of its origin. It cannot migrate to another sovereignty. Intangible personal property, owned by a foreign corporation doing business in this State is taxable in the State where the corporation was created, because the situs of the property is there; *such property owned by a domestic corporation is taxable here because its situs is here, the domicile of such corporation being within this State.*

There is nothing in any of these concessions which touch the argument in this case, and we mention them solely because our opponents have set them up as straw men. There is no tax laid directly on tangible property outside of our State limits, and it is only because of the persistency with which our opponents cling to the idea of a property tax in a wrong sense, that we repeat the thought.

An Important Principle.

We now call attention to a well settled principle as to tangible property; that at times it is to be treated as practically intangible because of its roving character; thus vessels engaged in foreign or interstate commerce have their situs at their port of registry and are tax-

able there, and shares of stock in national banks, located in this State, owned by non-residents of this State are taxable here. Vessels, if unregistered, have their situs for taxation in the State which is the domicile of their owner.

(*Commonwealth* v. *Standard Oil Co., 101 Penna. S. R., 119; Pullman's Palace Car Co.*, v. *Commonwealth, 107 Pa., 156;* affirmed in *Pullman's Palace Car Co.*, v. *Pennsylvania, 141 U. S., 18. Commonwealth* v. *American Dredging Co., 122 Penna. S., 386; Commonwealth* v. *Delaware, Lackawanna & Western R. R. Co., 145 Penna. S., 96; Commonwealth* v. *Pennsylvania Coal Co., 197 Penna. S., 551.*

The importance of this lies in the fact that while it is conceded that a direct tax cannot be laid on property situate outside of the State and which has never been within the State, and the value thereof must therefore be excluded in a computation of the value of the capital stock of a corporation, yet with regard to property which sprang into being from the loins of the State, and the legal domicile of which is still within the State because of its transitory character, the proceeds or value returning to the treasury of the corporation and necessarily enhancing the value of the capital stock, that value cannot be excluded in a computation of the actual value of the capital stock upon which the tax is laid.

And so the Courts have decided.

The cases of *Commonwealth* v. *American Dredging Company, 122 Penna. S., 386,* and of *Commonwealth* v.

Pennsylvania Coal Company, 197 P. S., 551, are specifically in point. In the latter, it was distinctly held that the value of coal which a Pennsylvania Mining Company had on hand in other Staes, and which it had shipped to such other States for the purposes of sale, and not to serve any permanent corporate purpose, could not be deducted in determining the value of the capital stock of such corporation for the purpose of taxation. And this latter case was again affirmed in *Commonwealth* v. *Delaware, Lackawanna & Western R. R. Co., Appellant, 206 Penna. S. R., 645,* being the case now under consideration.

THE NATURE OF A CAPITAL STOCK TAX.

In the light of the foregoing decisions it is now proper to consider the nature of the tax on capital stock. Corporations are taxed in various forms. The principal subjects of corporate taxation in Pennsylvania are capital stock, shares and franchises. The capital stock is the fund or property contributed by those who compose the corporation, which is used in carrying on the business of the corporation. The capital stock represents the property and is nothing except as it represents property. A tax, therefore, on capital stock is a tax on the property of a corporation but in the sense before explained; and this tax has always been levied upon capital stock according to the value of the property which it represents.

(*Commonwealth* v. *Standard Oil Co., 101 P. S., 119. Whitworth on Taxation of Corporations in Pennsylvania for State Purposes, Chapter I, Section 14, page 59.*)

An interesting history of the method by which this result was reached is set forth by Whitworth in his Work on "Taxation of Corporations in Pennsylvania for State Purposes," from page 59 to 140 inclusive. See also Eastman on "Taxation for State purposes in Pennsylvania," Chapter III, title "Tax on Capital Stock."

Without burdening this brief with a long list of authorities, it is sufficient to point out that the tax sought to be collected in this case is the five mills tax upon each dollar of the actual value of the capital stock of the corporation in question under the terms of Section 4 of the Act of 8th of June, 1891 (Penna. L. 229), and Section 1 of the Act of 8th of June, 1893, (Penna. L. 353). An analysis of the decisions relied upon by the Court below in the opinion appealed from will be sufficient for the purpose.

The leading case is that of *Commonwealth of Pennsylvania* v. *New York, Pennsylvania & Ohio R. R. Co., Appellant, 188 P. S., 169.* This was an appeal from a tax settlement. An opinion was delivered by Simonton, P. J., of the Dauphin County Court, a recognized authority on the subject of State taxation. He elaborately reviews the entire history of State taxation up to the year 1898 since which time there has been no revenue act passed altering the principles or the application of principles therein stated. On page 185 of 188 Penna. State Reports, he reaches the following conclusion of law:

"A tax on the capital stock of a corporation is a tax on its property and assets, including its franchises. The question of the actual value in cash of the capital

stock is a question of fact which must be determined by considering the value of defendant's tangible property and assets of every kind, including its bonds, mortgages and money at interest, and its franchises and privileges; and the amount of the encumbrances on its property and franchises is also a relevant fact from the value so ascertained and determined."

This opinion of the learned Judge in the lower Court was sustained by an opinion by Mr. Justice Dean, of the Supreme Court of the State, on 17th of October, 1898.

This case was followed by *Commonwealth* v. *Pennsylvania Coal Company, 197 P. S., 551,* in which it was held that the value of coal which a Pennsylvania mining corporation *has on hand in other States, and which it had shipped to such other States for purposes of sale, and not to serve any permanent corporate purposes, cannot be deducted in determining the value of the capital stock of such corporation for the purpose of taxation.* The Court, in a unanimous opinion delivered by Mr. Justice Brown, said:

"Capital stock tax is a property tax, but the property of the corporation, for the purpose of taxation, is reached through the tax imposed directly upon the stock, the value of which is ascertained in the first instance as directed by the Act of Assembly."

This is the latest expression of opinion on the part of the Supreme Court of Pennsylvania, and effectually disposes of the contention of the counsel for the plaintiffs in error in their first point, by showing in what sense the phrase "property tax" is to be understood in considering the nature of the capital stock tax sought to be recovered.

II.

The capital stock tax claimed is not a tax laid, or sought to be laid, directly upon tangible property beyond the territorial limits of Pennsylvania or the protection of her laws. Deductions from the value of the capital stock of a Pennsylvania corporation cannot be allowed for property which has not acquired a foreign situs, because of its return in value to the treasury of the company. It is the value of the stock that is taxed and not the property representing that value.

The argument of our opponents, under their second point, is tainted by the fundamental vice which underlies their first proposition. The terms in which they state it, if taken as they put it, lead to the conclusion that the tax claimed is a specific tax imposed upon tangible property, outside of the borders of the State. This is wholly inaccurate.

The facts are as follows:

The defendant, the Delaware, Lackawanna & Western Railroad Company, is a corporation of the State of Pennsylvania. It is engaged in the operation of a railroad and the mining, shipping and sale of coal. Its mines are situated in Pennsylvania, and it draws its wealth chiefly from this source. The par value of its capital stock is $26,200,000. It has made large profits, and owns much property, so that the officers of the company returned and appraised the value of the capital stock, representing its property, assets and franchises, between the first and fifteenth days of November, 1899, at $48,470,000. Upon this appraisement the Auditor

General and State Treasurer settled an account for tax amounting to $242,350. The officers of the company claimed a deduction from the appraised value of its capital stock, of $1,702,443, on the ground *that that sum represented coal* belonging to the company which was located outside of Pennsylvania, in New York, Illinois and other States, but the claim for deduction was disallowed by the Auditor General and from the settlement made an appeal was taken by the company to the Court of Common Pleas of Dauphin County.

The points reserved for the opinion of the Court related *not to a tax on coal, but to a tax* on the sum of $1,702,443, *"being the value of the coal."* Transcript of Record, p. 13.

The Commonwealth refused to allow the deduction claimed, because, while it is true that such coal as had been shipped from our own State to docks and storehouses at points outside of the State, and awaiting transportation to purchasers thereof, is tangible property, and was, at the time of its appraisement, physically located outside of the State, such location was not permanent nor intended to be permanent: and because the *value of the coal* returning to this State entered into and enhanced the value of the capital stock.

The Courts have held that tangible property, *permanently* located outside of the State, *for the use or benefit of the corporation,* is exempt from valuation for taxation, *but in no instance have the Courts decided that deductions should be allowed for the property of a corporation which is in transit to the place of its destination.* There has been no sufficient reason shown why coal that has been shipped and stored in warehouses, while it is

in transit to purchasers, should be placed in a position different from that of coal which is loaded in cars in the State or stored within the State awaiting shipment to purchasers outside of the State, *so far as its effect upon the value of capital stock is concerned.* On the contrary, the Courts have uniformly held that the value of such property shall not be deducted from the total value of the company's stock in making an appraisement for taxation.

The case now pending comes clearly within the rules stated by Mr. Justice Paxson in the case of *Commonwealth* v. *American Dredging Company, 122 P. S., 386,* wherein it is said:

"It must be conceded that the property in question must be liable to taxation in some jurisdiction. If it were permanently located in another State, it would be liable to taxation there. But the facts show that it is not permanently located out of the State. From the nature of the business it is in one place to-day and in another to-morrow, and, hence, not taxable in the jurisdiction where temporarily employed. It follows that if not taxable here, it escapes altogether. The rule as to vessels engaged in foreign or interstate commerce is that their situs for the purpose of taxation is their home port of registry, or the residence of their owner, if unregistered: *Pullman Palace Car Co., 29 Fed. Rep., 66; Hays* vs. *Pacific Mail Steamship Co., 17 How., 596.* These vessels, if they may be so called, were not registered. Hence, their situs for taxation is the domicile of the owners. This rule must prevail in the absence of anything to show that they are so permanently located in another State as to be liable to taxation under the laws of that State."

An examination of this case shows that the Court was dealing with a capital stock tax, and that the sense in

which a tax on property is spoken of must be the sense explained in our first proposition.

The learned Court in that case drew the line between property permanently located in another State and liable to taxation in that State and property temporarily in another State and not subject to taxation there: *i. e,* the value represented by the property. In that case the facts were that certain vessels were registered and certain vessels were not registered, and that where vessels were not registered, they were to be taxed. The situs of taxation is the domicile of the owner.

In the case of *Commonwealth* v. *Montgomery Lead and Zinc Company, 5 Pa. C. C. Reports, p. 89,* the principle of taxation in reference to tangible property of corporations is stated in the syllabus as follows:

"Section 4 of the Act of June 7, 1879, does not tax so much of the capital stock of domestic corporations as represents tangible property situate without the State and there employed for corporate purposes."

The case was that of a mining company, whose whole capital was invested in mining lands in Missouri. and its entire income was drawn from that source. It will be observed that the decision was based upon the principle that tangible property, permanently held outside of the State and employed there for corporate uses, was exempt from valuation for taxation in this State. This follows the principle announced by Mr. Justice Paxson in the case above cited. The tangible property belonged to the corporation, was permanently outside the State, and was subject to taxation in the jurisdiction where such tangible property was lo-

cated. It also appeared that it must not only be tangible property owned *permanently* by the corporation, *but that such property must be employed there for corporate purposes.* That case did not have in contemplation tangible property of a corporation that was simply being sent to its point of destination. All these cases contemplate tangible property to be permanently attached to the corporation and used and employed for corporate purposes.

To the same effect is the case of *Commonwealth* v. *Standard Oil Company, 101 P. S., 119.* It is to be observed that this was the case of a corporation foreign to Pennsylvania. The Court announced the principle that so much of the tangible property of corporations as was situated in other States, and there employed in their corporate business was not liable to valuation for taxation here. The rule in both these cases is based upon the principle that the tangible property must be permanently owned by the corporation and that it must be employed in the corporate business.

For this reason it has been held that the cars, rolling stock and other personal property of railroad companies, located permanently outside the State, and there permanently used in the transaction of the corporate business, should be deducted from the valuation of the capital stock of a corporation located in this State. In all of these cases, however, the deduction for real estate and personal property, permanently located outside the State was allowed on the principle that as all of these elements of value have entered into the valuation of the capital stock of a corporation in our State, and are permanently held outside of the State,

there should be a deduction made from the valuation of the capital stock in our State for purposes of taxation.

We contend that the door should not be opened any wider than it is for the purpose of allowing these deductions. The coal of the defendant company, for which a deduction is asked, is located in New York, Illinois and other States. But it came from Pennsylvania. It has all been shipped from mines in Pennsylvania to these points in transit to the purchasers. We do not understand the facts to be that a capital stock tax is imposed in any of the States named for State purposes. This we will notice specifically under our third point. Aside, from the question of the right to tax the coal in other States, it may be fairly contended that all that the Commonwealth of Pennsylvania is attempting to do is to place a tax upon the capital stock of the Delaware, Lackawanna & Western Railroad Company. It is right to take into consideration every element that enters into the valuation of that capital stock. That which makes the capital stock valuable is the coal which it mines and ships. The coal is taken from the bowels of Pennsylvania. The business of mining and shipping coal is going on all the while. Coal is being constantly shipped to Hoboken, Chicago and other places. From these points it is distributed, reshipped to other points and finally sold. We may fairly infer that, from the time the coal leaves the mines until it is shipped to these points and sold, and the proceeds of such sales finally return to the treasurer of the corporation, not more than from thirty to sixty days will elapse. Certainly, when the money from these sales comes back to Pennsylvania, it enhances the value of the capital stock, and

no deduction then would be claimed or allowed in the valuation of the capital stock. The very coal, for which the defendant now claims a deduction, has long since been sold, and its value in money returned to the treasurer of the corporation; and hence it has been the material thing that has entered into the valuation of that capital stock. The mere fact that the company has established its treasury in New York cannot affect the question. That was for its own convenience. It is a Pennsylvania corporation, and its treasury is at the domicile of corporate origin.

No Deduction can be Allowed for Coal so Situated.

But this question has been recently squarely raised and decided by the State Supreme Court in favor of the Commonwealth in the case of *Commonwealth* vs. *Pennsylvania Coal Company, 197 Penna. S., 551.* Mr. Justice Brown clearly states the principle as follows, January 7, 1901:

"The capital stock of the Pennsylvania Coal Company was appraised at $17,000,000 for the purpose of taxation. From this sum certain deductions were allowed by the Commonwealth, leaving the taxable value of the stock at $15,840,000, and from this still further deductions or exemptions are claimed by the appellant. Capital stock tax is a property tax, but the property of the corporation, for the purpose of taxation, is reached through the tax imposed directly upon the stock, the value of which is ascertained, in the first instance, as directed by the Act of Assembly. When the actual value of the capital stock is so ascertained, deductions or exemptions are necessarily allowed, from time to time, by the Commonwealth in determining the real sum upon which the tax ought to be assessed against the corporation; and the questions raised on this appeal are,

whether the mortgages on property outside the State, and the coal shipped to foreign points, should be taxed, or deductions allowed on their account.

"The two claims for exemption pressed by the appellant are for $418,208.70, the value of coal which it had on hand in New York, New Jersey, Illinois, Wisconsin, Minnesota and Canada, and $450,000, unpaid purchase moneys for properties which it had sold in New York and New Jersey, secured by mortgages to that amount. The coal had been shipped to the several States and country named for the purpose of sale. It was, it is true, of a tangible character, but, as the property of the coal company, it was neither to be permanently located where received nor intended permanently to serve any corporate purpose of its owner. It was an asset of the company for immediate sale, and not for use, temporary or permanent. The ownership in it to-day was, that it might be sold to-morrow. If it had been tangible property of the corporation, employed in its corporate business, the deduction claimed ought to be allowed: (*Commonwealth* v. *Pennsylvania Coal Company, 41 Leg. Int. 125,* the judgment in which case we affirmed); but it was not so employed, and what we said in *Commonwealth* v. *American Dredging Company, 122 Pa. 386,* of the dredges, tugboats and scows belonging to a domestic corporation, but which had been built outside of the State, and had never been within it, applies with more force to this item of coal, and it is conclusive of the Commonwealth's contention that no deduction ought to be made for it. It must be conceded that the property in question must be liable to taxation in some jurisdiction. If it were permanently located in another State, it would be liable to taxation there. But the facts show that it is not permanently located out of the State. From the nature of the business, it is in one place to-day and in another to-morrow, and, hence, not taxable in the jurisdiction where temporarily employed. It follows that if not taxable here, it escapes altogether. The question here is simply one of a proper valuation by this State of the capital stock of the appellant for the purpose of taxation, and is not controlled by *Brown* v.

Houston, 114 U. S. 622, where other questions than that before us now were raised under the contention as to the right of the State of Louisiana to tax, by its general laws, coal mined in Pennsylvania (upon which the tax had been paid here) and shipped to New Orleans, to be sold on account of the owners in Pennsylvania.

"The mortgages held by the appellant for the unpaid purchase moneys for properties sold by it in New York and New Jersey, are to be treated in this proceeding as ordinary mortgages securing money loaned. They themselves do not go to make up the assets of the corporation in determining what value shall be placed upon its capital stock, but the money which they were given to secure, and which it had, or will have, the right to collect, imparts the value. They represent, and are but security for, the debts or obligations held by the corporation, which are personal property and intangible things, having as their situs the domicile of the owner, and therein taxable: *Commonwealth* v. *American Dredging Company, supra,* and *Commonwealth* v. *Del. L. & W. R. R. Co., 145 Pa., 96.* Besides, by the very words of the Acts of June 1, 1889, and June 8, 1891,—'all moneys loaned or invested in other states, territories, the District of Columbia, or foreign countries'—they are taxable here. As well might deduction be allowed for actual cash in the treasury of this company as for these mortgages representing money, which, sooner or later, will get into the treasury. The views of the learned Court below having been correct on the questions involved, the judgment is affirmed."

It will be seen that it is this case upon which the Court, in the opinion appealed from, relied, by which it was controlled, and which it solemnly affirmed. It is important to observe that the facts in the two cases are almost precisely identical, and it is also important to observe that the vice of the argument of the plaintiff in error is in the assumption that the coal in question has been permanently located outside the State of Pennsyl-

vania for the use or benefit of the corporation, has become incorporated with the property of other States, and has there been taxed. This is a misapplication of our decisions. While it may be conceded that our Courts have held that tangible property, permanently located outside the State for the use or benefit of the corporation, is exempt from taxation, yet in no instance have they gone so far as to allow deductions in the computation of the value of the capital stock for the property of a corporation that is in transit to the place of its destination, or which, when sold, returns to enhance the value of the capital stock. *In fact it may be fairly contended that before it leaves the State its value enters into the capital stock.*

In the case under consideration the Court of Common Pleas of Dauphin County followed as a binding authority the opinion just quoted in full, and the Supreme Court of Pennsylvania, after argument and re-argument, affirmed in distinct terms the case of *Commonwealth* v. *Pennsylvania Coal Co., 197 P. S., 551,* as properly stating the rule. The findings of fact and the opinion of the Court of Common Pleas in the case under consideration appear in the Transcript of Record, page 27 to 33 inclusive, and the opinion of the Supreme Court of Pennsylvania, now appealed from, appears upon page 43 of the Transcript of Record. An examination of both opinions will show that the case was considered by both Courts to be entirely within the lines of the rule laid down by the highest Court in Pennsylvania. Judge Weiss, in the Dauphin County Common Pleas (Transcript of Record page 30), said:

"The coal was here as real estate, until it was mined. It became, and remained, personal property from that time. *As such it entered into the value of capital stock.* It was transported to points in other States for temporary storage and immediate use. It is not a thing used in the prosecution of the business of the company. It serves no corporate purpose. It is a commodity dealt in by the company. The product which is taken out of the earth in this State, and which, as such, entered into the measure and determination of the value of the company's property for taxable purposes, is removed out of the State for the sole purpose of a ready sale. It may be, and doubtless was, transported from there to other States and places after it was sold. But wherever sold, the proceeds eventually came back to the State from whence the mined product was shipped for the purpose of sale, and where its officers and treasurer, in contemplation of law, reside.

"The coal was taken from its taxable habitat, imbued with the nomadic instinct, ordained to wander far and wide through other States seeking and finding a commercial mart, and, in its changed form, sent on the pilgrimage back to its original domicile.

"It is this itinerant trait which likens the case to the dredges, tugs and scows in *Commonwealth* v. *American Dredging Company, 122 Pa., 386,* employed beyond, but taxed within, the boundaries of this State; and subjects the coal to taxation in the parent jurisdiction, from whence it ought to go exempt from the imposition of further burdens elsewhere for State purposes for the year specified.

"That cannot be said to be permanent or have fixity, which is voyaging from place to place for a market. Horses, cattle and other movable chattels, when transported to another jurisdiction, are ordinarily kept and used there for some purpose attendant upon the pursuits or business of the owner. They may with propriety be said to be located there permanently.

"But coal mined or unmined, as well as the proceeds

of the sale of the produce, are protected by the laws of this State, and must accordingly respond to the burden of taxation in this State. Protection and taxation are co-related * * * * * * * * * * *

"There was no assessment of a tax upon the real estate lying beyond the limits of the State, upon which the coal was placed, because it was permanently located beyond the taxing jurisdiction of the Commonwealth, and never subject to the visatorial power of the auditor general or any other authority.

"But the dismantling of real estate situate in this State, and the transportation of the severed fragments into other States for the avowed purpose of sale, even though placed there before the actual valuation and assessment was paid thereon, is quite a different proposition.

"The company is required not only to estimate and appraise its capital stock at its actual value in cash between the first and fifteenth days of November of each year, but it must be not less 'than the average price the said stock sold for during the year ending with the first Monday of November,' 1899, 'and not less than the price or value indicated or measured by net earnings or by the amount of profit made and either declared in dividends or carried into surplus of sinking fund.'

"After it leaves the parent ledge or vein, it is a constantly moving commodity, never the same in quantity or identity during any week, month, year, or years, going to its dumping pile to-day, departing, to-morrow —fugitive ever until it reaches the torch.

"By the comity which obtains among the several States, and which has the force and sanction of law, property situate as this is, ought to be taxed by the sovereign in whose domain it is produced, and who granted the franchise to produce it; and the product transported for sale to other States ought to be exempt from further taxation there for the State purposes.

"This rule is also in accord with the dictates of equity, for by it the value of the produce as represented

by the capital stock, can be ascertained with almost mathematical exactness.

"In *Commonwealth* vs. *Railroad Co., 145 Pa., 104,* the Supreme Court, comenting upon the case of *Commonwealth* vs. *American Dredging Company, 122 Pa., 386,* says: 'The dredges which were the subjects of the controversy were taxable at the situs of the company, for the reason that although wholly used outside of the Commonwealth, they did not remain in any one place long enough to render them liable to taxation there.'

"Having reached the conclusion that the shipment of the coal into other States for the purpose of sale does not give it the character of permanency there, so as to exempt it from taxation here, and being also of the opinion that even if the testimony had actually disclosed the fact that the coal shipped into the other States was taxed for the same year prior to its disposition and the tax paid by the company, it would still be taxable by this State, there remains only the duty to direct judgment to be entered upon the reserved question in favor of the Commonwealth and against the defendant company for the sum of $8,512.22, eight thousand five hundred and twelve and twenty-two one-hundredths dollars, with interest from July 8, 1900, unless exceptions are filed as required by law, as follows, viz:

Tax on coal, ...	$8,512 21
Interest at 12 per cent. from July 8, 1900, to May 22, 1901, ...	945 89
Attorney General's commission, ...	425 61
	$9,883 71."

OPINION OF THE SUPREME COURT.

The Supreme Court, by Mr. Justice Brown (Transcript of Record, page 43) spoke as follows:

"This case is not distinguishable from *Commonwealth* v. *Penna. Coal Co., 197 Pa., 551,* and is controlled by it. Our attention is called to the fact that, in the

present case, taxes were assessed and paid in the States where the coal was stored awaiting sale, and we are asked to regard the payment of those taxes as creating a distinction between the two cases. A sufficient answer to this is the Court's finding that it does not appear whether they were paid for State, local or municipal purposes; and it appears they were paid without contest.

"One of the branches of this appellant's business is the mining and sale of coal. To enable it to sell this commodity in other States some of its tangible property must be permanently in them, and so much as is so located and permanently serves the corporate purpose of the company, which is the sale of its coal, is not taxable here. But the coal itself is not such exempted property. *As soon as it is mined here it enters into the value of the company's capital stock, upon the actual value of which the Commonwealth is entitled to her tax.* When shipped out of the State it is for the purpose of sale, and not for permanent storage. As fast as it is received at the wharves and in the yards the company aims to turn it into money, which will pass at once into its treasury. 'It is not a thing,' as the learned judge below very properly said, 'used in the prosecution of the business of the company.' The business is prosecuted that the coal may be sold, and the exemption from taxation does not extend to the commodity itself, but is confined to such of the corporate property as must be used outside of the State to enable the company to conduct its business. This is the limit of exemption from taxation here, and the appellant's coal shipped to other States for sale was properly taxed by the Commonwealth's officers."

The second point of the counsel for plaintiff in error is that it was never within the intent nor the power of the legislature to impose a tax upon tangible property not held within the territorial limits of the State. We concede that. But we claim that this tax is not upon

tangible property outside the State. We claim the right to tax the capital stock representing the value of this coal, because it is owned by this company, mined in Pennsylvania, is on its way to a foreign market, but is still owned by this company. *Moreover before the coal starts on its journey, as soon as it is mined, it enters into the value of the capital stock.* When sold the profits come back into this State into the hands of a corporation of this State, no matter where its treasury may be located. We claim that we have a right to consider the value of the coal as having entered into the capital stock as soon as it is mined; that is to say, we have the same right to treat the coal as one of the items that enter into the value of the capital stock, as we have to treat the money realized from the coal when it has been returned to the State and is in the surplus fund. That is the point we stand on. There is nothing in the long line of cases cited by our adversaries which we do not concede. But the cases cited do not affect our proposition *that deductions from the value of the capital stock of a Pennsylvania corporation cannot be allowed for property* which has not acquired *a foreign situs, because before the property has even started on its pilgrimage, its value has entered into the capital stock.*

III.

We do not concede that the coal in question was permanently located and actually taxed in States other than Pennsylvania; nor do we concede the pertinency of the case of Brown vs. *Houston, 114 U. S. 622, and the authorities cited in support and confirmation thereof.*

In this connection it is important to observe that the parties are concluded by the findings of fact of the Court below which, under the Act of the Pennsylvania Assembly of April 22, 1874 (P. L. 109), sustained in *Commonwealth* v. *Westinghouse Electric & Manufacturing Company, 151 P. S., 265,* have the effect of a verdict of a jury. The agreement of counsel (Transcript of Record, page 13) reserved for the consideration of the Court the capital stock tax upon $1,702,443, "being *the value* of coal held and owned at points in States other than Pennsylvania" and "the question of defendant's liability to the Commonwealth of Pennsylvania for taxes upon or in respect of said coal held, owned and stored at points in States other than Pennsylvania is hereby reserved, and it is agreed that it shall be submitted for the determination of the Court. If the Court shall be of the opinion that, upon the facts stated in the aforesaid depositions of Fred. F. Chambers and W. H. Truesdale, attached and made part hereof, the defendant is liable for tax to the Commonwealth of Pennsylvania upon coal thus held, owned and stored at points in States other than Pennsylvania, then judgment shall be entered in favor of the Commonwealth and against the defendant."

The Court, in its findings of fact and opinion, found (Transcript of Record, page 30):

"The coal was here as real estate until it was mined. It became, and remained, personal property from that time. *As such it entered into the value of capital stock.* It was transported to points in other States for *temporary storage and immediate sale.* It is not a thing used in the prosecution of the business of the company. It serves no corporate purpose. It is a commodity dealt in by the company. The product which is taken out of the earth in this State, and which, as such, entered into the measure and determination of the value of the company's property for taxable purposes, is removed out of the State for the sole purpose of a ready sale. It may be, and doubtless was, transported from there to other States and places after it was sold. But wherever sold, the proceeds eventually came back to the State from whence the mined product was shipped for the purpose of sale, and where its officers and treasurer, in contemplation of law, reside.

"The coal was taken from its taxable habitat, imbued with the nomadic instinct, ordained to wander far and wide through other States seeking and finding a commercial mart, and, in its changed form, sent on the pilgrimage to its original domicile * * * * * * * * That cannot be said to be permanent or have fixity, which is voyaged from place to place for a market. Horses, cattle and other movable chattels, when transported to another jurisdiction, are ordinarily kept and used there for some purpose attendant upon the pursuit or business of the owner. They may with propriety be said to be located there permanently. But coal mined or unmined, as well as the proceeds of the sale of the product, are protected by the laws of this State, and must accordingly respond to the burden of taxation in this State. Protection and taxation are correlated * * * * But the dismantling of real estate situate in this State, and the transportation of the severed fragments into other States for the avowed purpose of sale, even though placed there before the

actual valuation and assessment was paid thereon, is quite a different proposition * * * * * After it leaves the parent ledge or vein, it is a constantly moving commodity, never the same in quantity or identity during any week, month, year, or years, going to its dumping pile to-day, departing to-morrow * * * * fugitive ever until it reaches the torch."

As to the payment of taxes the trial Judge said: (Transcript of Record, page 31)

"All taxes assessed against the company for 1899 in other States on coal located there have been paid, according to what the secretary of the company says he believes and so far as he can now recall, *but it does not appear that said taxes were not for local or municipal purposes and not for State purposes, and it does appear that the taxes laid were paid without contest.*"

The Supreme Court of Pennsylvania (Transcript of Record, page 43) says:

"Our attention is called to the fact that, in the present case, taxes were assessed and paid in the States where the coal was stored awaiting sale, and we are asked to regard the payment of those taxes as creating a distinction between the two cases (the reference here is to the case of *Commonwealth* v. *Pennsylvania Coal Co., 197 P. S., 551*). A sufficient answer to this is the Court's finding of fact that it does not appear whether they were paid for State, local or municipal purposes; and it appears they were paid without contest."

Mr. Truesdale, the president of the railroad company, sets forth in his affidavit no facts whatever, but simply states that he has read the sworn statement of the secretary, concurs therein and desires that the same may be considered with a like effect as if the contents were by himself recited.

An examination of the affidavit of Mr. Chambers, set forth on page 14 of the Transcript of Record, discloses a reference to the payment of taxes which, in express terms, relates to the real estate, local in its character, assessed and taxed upon the real estate in Pennsylvania for county, city, borough, school, road, poor and other purposes. This falls within Class III of the Analysis of Taxes given under the first proposition in our argument. No real estate tax is imposed by the State of Pennsylvania. Such taxes are purely local and municipal in their character and do not go into the State Treasury.

The other reference by Mr. Chambers to the payment of a tax is contained in his additional affidavit, set forth on page 26 of the Transcript of Record, and is limited to the taxes mentioned in his former affidavit. He says: "Referring to taxes mentioned in my former affidavit * * * * * I desire to add that they have been paid, I believe." He then adds:

"The company is not contesting, but on the other hand concedes the right of New York, New Jersey, Michigan and Illinois, and the other States, and Canada, to tax coal located and stored in said States. The only question pending at present is as to the amount of valuation in the State of New York for 1899, and as soon as that valuation is definitely fixed the company will pay the tax without any question as to the authority of the State to levy the same. All taxes, so far as I can now recall, State and local, which have been assessed against this company for 1899, in any of the States mentioned, have been paid."

All of this is exceedingly vague and inconclusive and justifies the finding of the learned Court that it did not

appear that the taxes were not for local or municipal purposes and not for State purposes, nor did it appear that the taxes laid were paid without contest. (Transcript of Record, page 31). This is affirmed by the Supreme Court in saying "It does not appear whether they were paid for State, local or municipal purposes, and it appears they were paid without contest." (Page 43).

The only remaining reference in the affidavit of Mr. Chambers is to be found on page 22 of the Transcript of Record, where he says:

"The said coal, when shipped from Pennsylvania, was destined to said points in other States with no intention of ever returning the same to Pennsylvania. On the contrary, said coal was intended to, and did, become part of the general mass of property in said other States, and the company is there annually taxed upon or in respect to the same and was so taxed for 1899."

This ignores the fact that where the coal was mined its value entered into the capital stock, and that though the coal itself never returned, yet its value returned to the treasury.

It does not appear where it was taxed or by whom it was taxed or for what purposes it was taxed, and the statement that the company is annually taxed "upon or respect to the same" is equally vague, and it cannot be ascertained whether it was a specific tax, directly laid upon coal as tangible property within the boundaries of the taxing State, or whether there was a tax upon capital stock representing property employed in the taxing State. It would have been easy for the company to

produce tax receipts if they have paid a tax on nearly two million dollars worth of coal and put the receipts in evidence. In view of the vagueness of the affidavits and the lack of clear, specific proof, and in view of the findings by the Court and their affirmation by the Court above, counsel for the Commonwealth of Pennsylvania cannot concede the proposition that the coal was permanently located and actually taxed in States other than Pennsylvania.

But even conceding, for the sake of argument, that a tax has been imposed in the other States, that cannot preclude the Commonwealth of Pennsylvania from seeking to impose a capital stock tax and determine its value by considering the value of the coal represented by such capital stock. In his affidavit (page 22, Transcript of Record) Mr. Chambers says: "When the coal thus kept in stock in the States of New York, Illinois and other States outside of Pennsylvania is sold the proceeds are returned to the company's treasury in the city and State of New York." Much is made of this by counsel for the plaintiff in error, but they overlook the fact that the railroad company is not only a corporation of the State of Pennsylvania, authorized to operate a railroad, but that it is also a mining company, authorized to mine and sell coal, and that the location of its treasury in the City of New York is a privilege granted for its own convenience but which cannot effect a legal change in the domicile of the corporation, which is clearly the domicile of its corporate origin.

BEFORE THE COAL HAD STARTED ON ITS JOURNEY, THE RIGHT OF PENNSYLVANIA TO TAX CAPITAL STOCK, INTO THE VALUE OF WHICH THE VALUE OF THE COAL HAD ENTERED, HAD ATTACHED AND COULD NOT BE DIVESTED.

In dealing with the question whether, even if there were a tax imposed in other States upon coal treated as tangible property incorporated with the general property of the taxing State, the learned Judge in the Dauphin County Common Pleas (Transcript of Record, page 31) said:

"Taxation there would not suspend the right to tax property located here and forming part of a mass *which, as well before severance from the land as after, and of course, prior to its transportation elsewhere, entered into and affected the value of the capital stock,* and which was so deposited elsewhere, for a mere temporary and not a permanent, purpose. *Primary jurisdiction to tax the coal attached here and its voluntary carriage into other States for sale, does not detach it, even if by law of those States it is again taxable there.*"

Again the learned Judge (Transcript of Record, page 32) says:

"By the comity which obtains among the several States, and which has the force and sanction of law, property situate as this is, *ought to be taxed by the sovereign in whose domain it is produced, and who granted the franchise to produce it;* and the product transported for sale to other States ought to be exempt from further taxation there for the State purposes.

"This rule is also in accord with the dictates of equity, for by it the value of the product as represented by the capital stock, can be ascertained with almost mathematical exactness."

All this is of the very marrow of the question. The Supreme Court (Transcript of Record, page 43) said:

"Our attention is called to the fact that, in the present case, taxes were assessed and paid in the States where the coal was stored awaiting sale, and we are asked to regard the payment of those taxes as creating a distinction between the two cases. (*Commonwealth* v. *Pennsylvania Coal Company, 187 P. S., 551,* is the case alluded to). A sufficient answer to this is the Court's finding that it does not appear whether they were paid for State, local or municipal purposes; and it appears they were paid without contest.

"One of the branches of this appellant's business is the mining and sale of coal. To enable it to sell this commodity in other States some of its tangible property must be permanently in them, and so much as is so located and permanently serves the corporate purpose of the company, which is the sale of its coal, is not taxable here. But the coal itself is not such exempted property. *As soon as it is mined here it enters into the value of the company's capital stock, upon the actual value of which the Commonwealth is entitled to her tax.* When shipped out of the State it is for the purpose of sale, and not for permanent storage. As far as it is received at the wharves and in the yards the company aims to turn it into money, which will pass at once into its treasury. 'It is not a thing,' as the learned judge below very properly said, 'used in the prosecution of the business of the company.' The business is prosecuted that the coal may be sold, and the exemption from taxation does not extend to the commodity itself, but is confined to such of the corporate property as must be used outside of the State to enable the company to conduct its business. This is the limit of exemption from taxation here, and the appellant's coal shipped to other States for sale was properly taxed by the Commonwealth's officers."

INAPPLICABILITY OF CASES CITED BY PLAINTIFF IN ERROR FROM UNITED STATES REPORTS.

It is strangely supposed that the case of *Brown* v. *Houston, 114 U. S., 622,* is an authority conclusive against the right of the State of Pennsylvania to insist upon a capital stock tax. The understanding put upon that case by the learned trial judge was that it had there been decided that a tax laid by the State of Louisiana pursuant to a general law upon coal transported into that State from Pennsylvania, was not a tax violative of the provisions of the Constitution of the United States relative to duties on imports or exports and regulating commerce among the several States. Neither *Brown* v. *Houston* nor any of the cases cited in support of it are authorities to the effect that a tax laid upon a commodity brought from one State into another State, and becoming mixed with its general property, and therefore sustainable as a local tax, would operate as a prohibition against the imposition of a tax of the nature sought to be established here in the State from which the commodity was exported. The tax legislation of one State cannot operate as a prohibition against the tax legislation of another State. Besides, if there be any conflict, the right to tax primarily existed in the State where the product was mined. Besides what is spoken of in *Brown* v. *Houston* was a specific tax on property in Louisiana. This kind of a tax cannot operate to the destruction of a capital stock tax in Pennsylvania, which attached before the coal had started on its journey.

Qui prior tempore, prior jure. So far as equities are concerned, those of Pennsylvania are the stronger.

It cannot be contended that the Revenue Act of Pennsylvania of 1891 (the revenue act under discussion) imposes a duty upon exports. It cannot be contended that it imposes a duty upon imports. It cannot be pretended that it is a regulation of commerce, or that it interferes with commerce between the different States. Neither in terms nor in substance does it pretend to be a regulation of commerce, nor can it have such an effect. The language of Mr Justice Bradley, quoted from *Brown v. Houston*, as well as the language of Mr. Justice Field, quoted from the *Pittsburg Coal Co.* v. *Bates, 156 U. S., page 588*, has no reference to the facts of the present case, except to illustrate the impossibility, as well as inaccuracy, of the contention that the State statute of Pennsylvania amounted to a regulation or a restriction upon commerce between the States; for it is well established that if a State statute is simply an exercise of local administration, under the general taxing power, it is, even though it incidentally affects the subjects of commerce, entirely proper as being within the power of a State until Congress should see fit to interfere and make express regulations on the subject.

The State statute under consideration is not a tax imposed upon coal as a foreign product, nor is it a tax imposed upon the product of another State, nor is it a tax imposed upon an export to another State, nor is it a tax imposed upon an article of commerce in a state of transit through the State to some other place of destination. Hence, such cases as those of *Brown* v. *Hous-*

ton, Coe v. *Earl, 116 U. S., 517; Pittsburg & Southern Coal Co.* v. *Bates, 156 U. S., 577; Kelly* v. *Rhoads, 188 U. S., 1,* and *Diamond Match Co.* v. *Ontonagan, 188 U. S., 82,* have no application. The case of *United States* v. *Knight, 156 U. S., 1,* is equally wide of the mark as that case related solely to the question of a monopoly charged to be created in violation of an Act of Congress.

IV.

No Federal Question is Involved.

It is difficult to see the Federal aspects of the question. Counsel do not state those features boldly or in terms. Nor is it easy to understand the citation from the opinion of Chief Justice Marshall in the case of *McCulloch* v. *Maryland, 4 Wheaton, 316.* All that Chief Justice Marshall said may be conceded. In its application to the case then before him, which was an effort on the part of a State to tax, and, possibly, tax out of existence a creature of the national government what he said was entirely proper, but in the present case the citation is aimed at nothing. It is a shot into the open air. To argue that a power to tax involves the power to destroy, when predicated of State legislation aimed at the destruction of a creature of the Federal government, is proper, but when spoken of in connection with the power of a State to impose a capital stock tax upon a corporation of its own creation, and to use such a citation as an argument destructive of the inherent and inalienable rights of State sovereignty when exercised upon proper subjects, is to deny to the State the exercise of a right to live. We do not deny the right of other States to tax coal, if it becomes a part of their own State wealth. It is not clear in the present case that they have done so, but, had they done so, to say that a tax imposed elsewhere upon a specific article of property destroys the right of

Pennsylvania to impose a capital stock tax, such as has been explained, upon one of her own corporations, is to say that she must yield her right to live, and her very means of living to the power of every other State legislature, and pour her blood by transfusion into their veins and bleed to death for their benefit. The coal, when mined, was torn from the soil of Pennsylvania, it became a part of the wealth of a corporation chartered by her with the right to mine. No State tax is imposed by Pennsylvania upon real estate. Such taxes are exclusively local, but the coal when mined entered into the value of the capital stock of the corporation. If the mines were exhausted or the coal, still in transit or at rest, wherever located, were destroyed before sale, it would depreciate the value of the stock and a fall in the market price of the stock would undoubtedly take place. If the coal be sold and in transit, or if sold while at rest and not yet delivered, the book credits which were given, the bills receiveable and the accounts collectible would still belong to the company and enhance the value of the stock. It is not the coal which is the object of this tax, but it is the value of the coal represented by the capital stock which is sought to be reached. Coal, once mined, can never be replaced. It does not grow nor is it capable of replenishment. If a coal company can escape taxation on its capital stock on the ground of the coal being in transit, so would it be with oil and gas and iron, which, with coal, constitute the four great natural products of our State. Our forests have gone, but fifty years of careful forestry may replace them. Not so with coal or oil or gas or marble or cement or kaolin or iron ore. These,

once gone, are gone forever. The result of the argument of counsel is indeed startling. The doctrines of John Marshall can never be construed to mean State suicide.

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